Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Implementation of the Non-Accounting Safegurards of Sectins 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

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SBC COMMUNICATIONS INC.'S REPLY TO COMMENTS/OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

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Table of Contents

SUMMARY

In this Reply to Oppositions and Comments to Petitions for Reconsideration, SBC Communications Inc. responds to the arguments of parties requesting that the Commission promulgate regulations that are inconsistent with the letter and spirit of the Telecommunications Act of 1996 and at variance with the record in this proceeding, as follows:

- The Commission's definition of "joint marketing" is unduly narrow. The Commission should reconsider the Non-accounting Safeguards First Report and Order and adopt Ameritech, BellSouth, and US West's arguments, both in the application of Section 271(e) and Section 272(g), that Congress intended that the term "marketing" include much more than "sales."

- The Commission should reconsider the requirement that only a Section 272 affiliate may perform "operating, installation, and maintenance" functions associated with switching and transmission facilities owned by a Section 272 affiliate or obtained by a Section 272 affiliate from a provider other than the BOC. Section 272 does not govern the relationship between the BOC and a non-Section 272 affiliate or between a non-BOC, non-Section 272 affiliate and a Section 272 affiliate. Moreover, the sharing of services among affiliates meets the policy rationale the Commission has invoked no less than the rules the Commission has adopted.

- The Commission should reconsider the requirement that a BOC's out-of-region interLATA information services be provided through a Section 272 affiliate. Section 272(a) requires separation for "[a] Bell operating company (including any affiliate) that is subject to the requirements of Section 251(c)." Where a BOC or BOC affiliate is not operating "subject to the requirements of Section 251(c)," that is, as an ILEC in a particular area, no Section 272 separate affiliate requirements apply at all. Where a BOC or a BOC affiliate is operating outside of its ILEC territory, none of its services is subject to Section 272 separate affiliate requirements.

- Contrary to the arguments stated in the Time Warner Petition and supported by Cox Cable, the 1996 Act does not require that video programming be provided through a separate affiliate. Video programming services are not "interLATA information services" and are not subject to Title II regulation.

- The Commission should reject the imposition of additional reporting requirements upon a BOC and its Section 272 affiliates.

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Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

SBC COMMUNICATIONS INC.'S REPLY TO COMMENTS/OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

SBC Communications Inc. ("SBC"), on behalf of its subsidiaries and affiliates, respectfully submits its Reply to the Comments and Oppositions to certain Petitions for Reconsideration in the above-captioned proceeding.[1]

I. INTRODUCTION

As set forth in its Opposition, SBC advocates that the Commission reconsider the Non-accounting Safeguards First Report and Order in a manner that conforms with the terms of the Telecommunications Act of 1996 (the "1996 Act") and the record in this proceeding. The Commission should reject petitions for reconsideration that propose changes that are inconsistent with the terms of either the 1996 Act or the Communications Act of 1934 or which are not

[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, First Report and Order, FCC No. 96-489 (released December 24, 1996).

supported by the record in this proceeding.

II. DISCUSSION

A. THE COMMISSION SHOULD ADOPT A BROADER, NOT NARROWER, DEFINITION OF "MARKETING" AND APPLY IT CONSISTENTLY

1. JOINT MARKETING ENCOMPASSES A WEALTH OF ACTIVITIES, BOTH BEFORE, DURING, AND AFTER THE INITIAL SALE

The Commission's definition of "joint marketing" is unduly narrow.[2] As a starting point, the Commission's conclusion that permissible, exclusive joint marketing under Section 272(g)(3) includes customer inquiries and sales is appropriate.[3] However, the scope of the concept of "marketing" militates that the Commission adopt Ameritech, BellSouth, and US West's arguments, both in the application of Section 271(e) and Section 272(g), that Congress intended that the term "marketing" include much more than "sales."

As the Commission has acknowledged in other contexts, the telecommunications marketing wave of the future is the "one-stop shop."[4] Proponents of the one-stop shop recognize that customer relationships are much more than published advertising leading to individual sales. Instead, customer care, including the ongoing sale of additional services to existing customers, the simplicity of a single bill for all of the services offered, and a single point-of-contact for maintenance, repairs, and information are the heart of the perpetual cycle of customer satisfaction and additional sales. The carrier that fails to provide satisfactory service to a consumer will soon

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[2]BellSouth at 7; US West at 14-15.

[3]Non-Accounting Safeguards First Report and Order at ¶296.

[4]See, e.g., In the Matter of the Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934, Notice of Proposed Rulemaking, WT Docket No. 96-162 at ¶51 (released August 13, 1997).

be replaced by another carrier that does provide such service.

In a competitive market, the provision of service--including "customer care"--frequently, if not always, implicates the marketing of service, and all customer contacts with the carrier and its service can provide joint marketing opportunities. Whether the contact is as simple as picking up the telephone and getting reliable dialtone, or successfully navigating an advanced feature adjunct to the basic telephone service, or speaking with an operator to place a call, or consistently being able to obtain information about or the repair of a service, each enables interaction between the carrier and customer that can lead to additional sales.

At issue, therefore, is not whether joint marketing may take place, but what actually occurs. If a customer uses operator service to place a call, he or she may be interested through interaction with an operator in obtaining a calling card; if a customer finds a "Call Waiting" feature to be useful, that customer's inquiry may lead to the purchase of conference call service. Customer inquiries such as, "Why won't my phone do X?" may lead to the development of just such a service. Any rule that selects certain customer contacts or marketing activities and decrees them off limits to "joint marketing" artificially limits competition in the telecommunications industry. Joint marketing is joint marketing, "regardless of when that sale takes place relative to other sales that have been made to the customer," as long as the consumer is a customer of one of the "joint marketers" or the activity intended to advance the cause of joint marketing or sales.[5]

The Commission should ask, "Does the activity provide or involve a marketing or sales opportunity?" If such an opportunity exists, then BOC/Section 272 affiliate activities necessary to make such an opportunity a success must be permitted. Such activity should be permitted

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[5]Ameritech at 25.

regardless of whether it occurs before or after the initial sale.

2. CONGRESSIONAL INTENT REQUIRES THAT A BROAD DEFINITION OF "MARKETING" BE APPLIED IN THE CONTEXT OF SECTION 271(e)

Parity in joint marketing opportunities is the express intent of the Order.[6] Once a BOC affiliate is authorized to offer in-region-originating, interLATA telecommunications services in a given state, nothing in the 1996 Act limits the ability of both BOCs and IXCs to market to their existing customer base on an ongoing basis. However, as Congress points out in the Senate Report to S.652, the joint marketing rights granted under the terms of the 1996 Act are intended "to provide for parity among competing industry sectors."[7] Consistent with this intent, any Commission order on joint marketing must permit a BOC and its Section 272 affiliates to market in the same manner as IXCs, post-relief. Moreover, there can be no parity if the large IXCs can avoid the present joint marketing restriction by selling a single service to a customer, followed immediately by the offering, in a single transaction, of bundled resold local and long-distance services, while the BOCs are still prohibited from providing interLATA service.

The Commission should, therefore, conclude that marketing activities undertaken by the large, incumbent interexchange carriers ("IXCs") after an initial sale are "joint marketing."[8] Section 271(e) precludes large IXCs from jointly marketing resold local service with long distance service. There is nothing in that section that limits the customers, or potential customers, to which

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[6] Non-Accounting Safeguards First Report and Order at ¶291.

[7] S. Rep. No. 652, 104th Cong., 1st Sess. 23 (1995).

[8] US West Petition at 5-6. Non-Accounting Safeguards First Report and Order at ¶278-82. The Commission delineated activities that it determined to be joint marketing within the purview of Section 271(e)(1). These included, but were not limited to, such things as bundling resold local service with long-distance service, selling both services in a single transaction, providing a discount if a customer purchases both services, conditioning the purchase of one service on the purchase of the other, and offering both services as a single, combined product.

the IXCs' marketing is restricted. As Ameritech states, "[T]he Act makes no distinction between joint marketing that occurs as part of an initial sale or after such sale."[9]

3. A BROAD DEFINITION OF "MARKETING" IS EQUALLY APPLICABLE IN THE CONTEXT OF SECTION 272(g)

The Commission's separation of post-initial-sale "customer care" from "joint marketing" advantages IXCs at the expense of the BOCs in contradiction to the legislative history of the 1996 Act.[10] This is not, however, the only infirmity in the Commission's description of the scope of "joint marketing." The Commission's failure to interpret "joint marketing" for BOCs and their Section 272 affiliates in a manner that includes planning, design, and product development activities fails, again, to recognize the common definition of marketing. Products are not "discovered" in a vacuum. Instead, they are developed in response to customer demand, which is itself a result of the customer's purchase and interaction with existing services. As US West avers, "In ordinary usage, marketing is not constrained as the Commission has concluded. Any intelligent 'marketing' requires a predicate product concept, product design, product development, and product management."[11] This process is not linear, but is instead interactive or cyclical, and the Commission should not globally exclude it from "joint marketing." The Commission should, instead, apply a definition of "joint marketing" similar to that used in business and academic circles to include all of the elements of product development, sales, and customer

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[9]Ameritech at 24.

[10]Joint marketing is a restriction upon the large IXCs, and limitations in its scope expands the IXCs' permissible activities; joint marketing is a freedom for BOCs, and limitations on its scope limits the BOCs' permissible activities.

[11]US West at 15; See also BellSouth at 9-10.

care.

B. OPERATIONAL INDEPENDENCE IS NOT DIVESTITURE; THE COMMISSION'S RULES NEED NOT BE OVERBUILT WITH ADDITIONAL, EXTRA-STATUTORY REQUIREMENTS AND SHOULD PERMIT GREATER SHARING OF SERVICES

As SBC pointed out in its Comments, and as other parties have echoed, AT&T and MCI would have the Commission reconsider its parameters for operational independence and impose restrictions approaching a de facto divestiture standard. In the context of Section 272(b), the phrase "operate independently" must have limited meaning.[12] Using no more persuasive arguments than they used in the underlying proceeding, AT&T and MCI invoke the phantasms of cross-subsidy and discrimination--each of which the Commission considered in writing the Order. The Commission's determination of the requirements of operational independence set forth in the Order already exceed the terms of the 1996 Act;[13] they need not be enhanced.

As US West argues, AT&T's contention that operational independence requires the layering of Section 274(b)'s requirements on top of those set forth in Section 272 is simply wrong.[14] Although each section requires, essentially, that a BOC and its Section 272 or Section 274 affiliates be operated independently, the overlap of certain statutory language and the omission of other language compels the conclusion that Congress determined that the interLATA services and manufacturing industries required the imposition of a different--and less-stringent--quantum of operational independence than the electronic publishing industry.[15]

Moreover, contrary to the nonsensical contentions of MCI, operational independence in

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[12]See Ex Parte Letter of SBC (November 14, 1996).

[13]Id.

[14]See generally, US West at 3-5.

[15]Id.

the context of Section 272 activities does not implicate utterly unassociated operations.[16] Appropriately or not, the Commission analyzed the statutory requirements of Section 272(b) against the historical context of the BOC Separations Order[17] and the Computer II Final Order[18] and applied a stringent operational independence requirement.[19] At the same time, because of the further language of Section 272 and other sections of the 1996 Act, the Commission recognized that notwithstanding any risk of discrimination or cross-subsidy speculated to exist, and contrary to the arguments of AT&T and MCI, Congress intended the sharing of services and the integration of business activities.[20] No lesser reading of Section 272 is possible.

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[16]See MCI at 4-10; see contra US West at 5-11.

[17]In the Matter of Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services By Bell Operating Companies, CC Docket No. 83-115, 95 F.C.C.2d 1117 (released December 30, 1983) ("BOC Separations Order").

[18]In the Matter of the Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), CC Docket No. 20828, Final Order, 77 F.C.C.2d 384 (1980)("Computer II Final Order").

[19]These include the requirements that:

> (a) the BOC and its section 272 affiliate be precluded from jointly owning switching or transmission facilities or the land or buildings where those facilities are located;
>
> (b) "a section 272 affiliate be precluded from performing operating, installation, and maintenance functions associated with the BOC's facilities"; and
>
> (c) "a BOC or any BOC affiliate, other than the section 272 affiliate itself, be precluded from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated."

Id. ¶ 158.

[20]Non-Accounting Safeguards First Report and Order at ¶¶ 162, 167-168, 178-180.

As both US West and BellSouth urge, the Commission should reconsider the requirement that "operating, installation, and maintenance" functions associated with switching and transmission facilities owned by a Section 272 affiliate or obtained by a Section 272 affiliate from a provider other than the BOC may only be performed by a Section 272 affiliate. As the Commission acknowledges, Section 272 does not govern the relationship between the BOC and a non-Section 272 affiliate or between a non-BOC, non-Section 272 affiliate and a Section 272 affiliate--except by means of the Commission's operational independence construct.[21] Permitting the sharing of services among all non-BOC affiliates, at a minimum, meets the policy rationale the Commission has invoked in favor of its restrictions on the sharing of services, as well as the policy it has memorialized in the Order. Moreover, there is no basis in the language of Section 272 from which to restrict non-BOC affiliate relationships.[22] The Commission should reject the arguments of AT&T and MCI and modify its definition of "operate independently" by eliminating the restriction upon non-BOC affiliates' performance of operating, installation, or maintenance functions on the switching and transmission facilities of Section 272 affiliates.

C. SECTION 272 DOES NOT REQUIRE A SEPARATE AFFILIATE FOR THE PROVISION OF OUT-OF-REGION INFORMATION SERVICES

Without delving into the detail of their positions, SBC advocates the same result as BellSouth and US West: The Commission should determine that Sections 271 and 272 do not require that out-of-region interLATA information services be provided through a separate affiliate. The specific terms of Section 272(a) require separation for "[a] Bell operating company (including any affiliate) that is subject to the requirements of Section 251(c)." (emphasis added).

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[21]Non-Accounting Safeguards First Report and Order at ¶¶ 182, 163.

[22]US West at 9-10.

Section 251(c) is applicable only to "incumbent local exchange carriers." "Incumbent local exchange carrier" (an "ILEC") is defined in Section 251(h) as:

> (1) DEFINITION.--For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -
>
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such areas; and
>
> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b); or
>
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i) . . ..[23]

To the extent a BOC or BOC affiliate is not operating "subject to the requirements of Section 251(c)," that is, as an ILEC in a particular area, no Section 272 separate affiliate requirements apply at all. In other words, to the extent that a BOC or a BOC affiliate is operating outside of its ILEC territory, none of its services is subject to Section 272 separate affiliate requirements.[24]

The Commission's interpretation of Section 272(a) has divorced the piece parts of Section 272 from Sections 251(c) and (h). This construction leads to a result that is not supported by any of the policy reasons Congress considered in adopting structural safeguards in the first place. There is little or no prospect for either discrimination or cross-subsidization between a BOC and

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[23] Section 251 also permits the treatment of "comparable carriers" as ILECs in certain circumstances.

[24] This is consistent with the Commission's determination in CC Docket No. 96-21. In the Matter of Bell Operating Company Provision Out-Of-Region Interstate, Interstate Services, Report and Order, FCC 96-288, CC Docket No. 96-21 (released July 1, 1996). Although the specific context of the Report and Order in CC Docket No. 96-21 was whether to regulate BOC's providing out-of-region interLATA services as dominant or non-dominant, the Commission stated that, pursuant to the terms of Section 271(b)(2), "the 1996 Act does not require a BOC to obtain Commission authorization prior to offering out-of-region, interstate, interLATA services." (emphasis added). Under the Report and Order, the only consequence of a BOC offering out-of-region, "interLATA services" would be subject to the BOC to "dominant carrier" regulation.

its interLATA affiliates, much less those that operate out-of-region.[25] The Commission should not require that out-of-region information services be offered through a separate affiliate.

D. THE 1996 ACT DOES NOT REQUIRE THAT BOCS PROVIDE VIDEO PROGRAMMING THROUGH A SEPARATE AFFILIATE

Time Warner contends in its Petition that video programming is regulated under Sections 271 and 272 in the same manner as any other non-electronic publishing information service and is, therefore, subject to the separate affiliate requirements of Section 272.[26] Contrary to the arguments stated in the Time Warner Petition and supported by Cox Cable, the 1996 Act does not require that video programming be provided through a separate affiliate.

As Ameritech points out,

(1) Whether interLATA or intraLATA, video programming services are not, by definition, information services;[27] and

(2) The Time Warner definition of video programming services cannot be reconciled with the Commission's definition of interLATA information services.[28]

Moreover, as BellSouth points out, even if video programming services could be twisted into the form of an interLATA service, they would be, nonetheless, exempt from the separate affiliate requirements of Section 272. Sections 271(g)(1)(A) and (h) expressly include "a Bell operating company['s]" direct interLATA provision of video programming, together with any necessary transmission services, as "incidental" interLATA services. Section 272(a)(2)(B)(i) then exempts "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of Section

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[25]See SBC Comments and Reply Comments and Affidavit of Richard Schmalensee (filed as an ex parte presentation November 15, 1996). See also SBC Comments and Reply Comments in CC Docket No. 96-61.

[26]Time Warner Petition at 4.

[27]Ameritech at 21-22.

[28]Id. at 23 (citing Order at ¶115).

271(g)" from Section 272's separate affiliate requirements. No Section 272 affiliate, therefore, is required.[29]

Finally, as US West points out, "[t]he limitations on a BOC's provision of interLATA information services are exclusively a concept of Title II regulation. . . . [while] a BOC's provision of video programming, as such, is governed solely by Title VI of the Communications Act."[30] First, video programming via open video system is excluded from Title II regulation by Section 653(c)(3). Second, video programming of all other sorts is excluded from Title II regulation by Section 651(a). Title II, including the requirements of Section 272, is simply inapplicable.

E. ARGUMENTS THAT ADDITIONAL REPORTING REQUIREMENTS SHOULD BE IMPOSED ON RECONSIDERATION ARE MISPLACED

TRA follows the lead of MCI and AT&T in advocating the imposition of additional reporting requirements upon a BOC and its Section 272 affiliates.[31] As SBC pointed out in its Opposition, these arguments should be addressed--and ultimately dismissed. Even if the existing reporting requirements are insufficient, this issue should be addressed pursuant to the pending Further Notice.

III. CONCLUSION

The Commission should reconsider the Non-accounting Safeguards First Report and Order in conformity with the arguments set forth herein.

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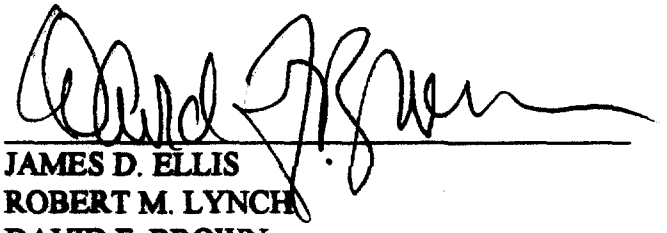
[29]BellSouth at 2-3.

[30]US West at 16-17.

[31]TRA at 12-14.

Respectfully submitted,

SBC COMMUNICATIONS INC.



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Date: April 16, 1997

CERTIFICATE OF SERVICE

I, Carrie P. Stacker, hereby certify that the copies of the foregoing "SBC COMMUNICATIONS INC.'S REPLY TO COMMENTS/OPPOSITIONS TO PETITIONS FOR RECONSIDERATION" in connection with the First Report and Order in CC Docket No. 96-149 were served by hand or by first-class United States Mail, postage prepaid, upon the parties appearing on the attached service list this 16th day of April, 1997.

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